context.[71] While the Access Board included the concept of fundamental alteration in its discussion of "readily achievable" under Section 255,[72] the FCC was not as explicit. TIA proposed the FCC recognize that it is not "readily achievable" to alter core features and price desired by the target market, as well as other fundamental characteristics of a product.

TIA was joined by several industry commentors in the view that the fundamental alteration of a product is not "readily achievable." Nextel pointed out, and TIA agrees, that the "readily achievable" factor of Section 255 is designed to result in a balanced approach to accessibility, where disabled consumers gain increased access to telecommunications services, yet the needs and desires of other consumers are not jeopardized. Thus, manufacturers should not be required to include accessibility features in their products to the extent such features conflict with the core designs or functions of such products.

TIA strongly believes that recognition of the fundamental alteration concept will not allow manufacturers to avoid their responsibilities under Section 255. Many features can be incorporated into products without resulting in fundamental alteration. TIA just asks the FCC to recognize the common sense notion that manufacturers' responsibilities to include accessibility features stop short of the fundamental alteration of a product.

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[71] 28 C.F.R. Part 36, App. B (commenting on § 36.104).

[72] Advisory Guidance, Subpart A, ¶ 3(d), Appendix to 36 C.F.R. Part 1193 (comment 3 on the definition of readily achievable).

VI. THE FCC SHOULD INTERPRET THE SCOPE OF SECTION 255 IN A MANNER THAT IS CONSISTENT WITH THE STATUTORY DEFINITIONS PROVIDED IN THE COMMUNICATIONS ACT AND FCC PRECEDENT.

TIA urges the FCC to interpret the scope of Section 255 in a manner that is consistent with the definitions provided in the Communications Act and developed in FCC precedent. Many of the commentors representing persons with disabilities argued that the FCC should interpret Section 255 to cover information services, multi-use equipment, and software, because, they argue, Section 255 is a civil rights statute that must be broadly interpreted to achieve its remedial purposes.[73] Regardless of whether Section 255 can appropriately be construed as a civil rights provision,[74] the FCC cannot interpret Section 255 in a way that expands its coverage beyond the scope of the statutory definitions.[75]

A. Information Services Are Not Be Subject To The Requirements Of Section 255.

TIA agrees with the Commission and commentors that information or enhanced services should not be subject to the requirements of Section 255.[76] Indeed, TIA, like other

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[73] E.g., NAD Comments at 10; NCD Comments at 6.

[74] TIA objects to this characterization. If Congress had intended Section 255 as a civil rights statute, it would have included it in Title 42 along with other statutes prohibiting discrimination based upon age, race, gender and disability. Instead, Congress included Section 255 in telecommunications legislation.

[75] Cf. Brown v. 1995 Tenet Paraamerica Bicycle Challenge, 959 F. Supp. 496, 498 (N.D. Ill. 1997) (refusing to expand coverage of the ADA beyond the scope of the "public accommodation" definition; "[a]lthough the ADA certainly was enacted with the intention of prohibiting discrimination against persons with disabilities, the language in question refers to 'facility' which appears clearly to be defined as a physical structure.").

[76] NPRM ¶ 42 (stating that "'[i]nformation services' are excluded from regulation" under Section 255); TIA Comments at 54; Information Technology Industry Council ("ITI") Comments at 9; Business Software Alliance ("BSA") Comments at 6 ("BSA strongly supports (Continued ...)

commentors, believes that the Commission's precedent, and the plain language of the statute require the Commission to separate information or enhanced services and telecommunications services for purposes of applying Section 255.

Some commentors would like to read Section 255 broadly to encompass information services or enhanced services, as well as telecommunications services. In the words of one commentor, the Commission should "revise the distinction between 'telecommunications and information services. . . .'"[77] Another commentor suggests that the Commission change the definition of information services so that "[a]ctions, which primarily constitute transmission of information by a user to a target, would fall into the *telecommunication* definition" while "[t]he offering of a plethora of information that is not targeted at a particular user would fall into the category of an information service."[78] In the words of another commentor, "[s]hould the Commission exclude all enhanced or information services from Section 255's coverage, it will effectively be denying to all Americans with disabilities access to the new and innovative telecommunications services that the rest of America is coming to enjoy. . . ."[79]

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the Commission's tentative conclusion that Section 255 does not apply to 'enhanced services' or 'information services,' but rather applies to 'telecommunications services' only.").

[77] MATP Comments at 1.

[78] Trace Comments at 4.

[79] NAD Comments at 15-16. See also American Foundation for the Blind ("AFB") Comments at 5 ("If the Commission were to read Section 255 narrowly, the effect (in conjunction with the Commission's deferral of the matter in the Universal Service Order) would be to deny universal access to information services to the disabled community."); TDI Comments at 8-10; MATP Comments at 1 ("[R]evise the distinction between 'telecommunications' and 'information services' to include those technologies, such as voice mail and voice menu systems. critical to full access and participation of people with disabilities.").

The Commission should resist the temptation to expand the scope Section 255. First, the plain language of the statute states that only telecommunications services are subject to Section 255:

> *A provider of telecommunications service* shall ensure that the service is accessible to and usable by individuals with disabilities, if readily achievable.[80]

As TIA noted in its opening comments, if "Congress wanted information services to be covered, it would have said so explicitly."[81] Support for this conclusion is drawn from the fact that telecommunications services and information services are separately defined in the Communications Act.[82]

The National Association of the Deaf insists that "Congress, too, was aware of the pervasive influence that these advancements [i.e., information services] would have on our daily existence and wished to ensure the inclusion of people with disabilities in the enjoyment of these benefits."[83] The plain language of the statute, however, defies this interpretation.[84] If Congress

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[80] 47 U.S.C. § 255(c). The Commission has correctly extended this language to limit the type of telecommunications equipment (i.e., that equipment used to provide telecommunications services) that is subject to Section 255. See NPRM at ¶ 53.

[81] TIA Comments at 53.

[82] See 47 U.S.C. § 153(20), (46).

[83] NAD Comments at 10.

[84] See Fawn Mining Corporation v. Hudson, 80 F.3d 519, 521 (D.C. Cir. 1996) ("When the statute's text makes its application reasonably clear, the meaning of the text should control."); Environmental Defense Fund, Inc. v. E.P.A., 82 F.3d 451, 468 (D.C. Cir. 1996) ("The plain meaning, if there is one, controls our interpretation of a statute 'except in the 'rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters.'"") (citing United States v. Ron Pair Enterprises, Inc., 489 U.S. 235, 242 (1989) (quoting Griffin v. Oceanic Contractors, Inc., 458 U.S. 564, 571 (1982))); Detweiler

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had wanted both telecommunications services and information services to be subject to Section 255, it would have used both terms in Section 255. It did not, and as a result, only telecommunications service providers and equipment used to provide telecommunications services are subject to Section 255.

Second, for the Commission to apply Section 255 to information services would be entirely inconsistent with the Commission's prior decisions. As commentors have recognized, the Commission has consistently drawn a clear distinction between information services and telecommunications services for purposes of regulation under the Communications Act.[85] The Commission recently summarized the distinction between information services and telecommunications services best in its Universal Service Report to Congress:

> After careful consideration of the statutory language and its legislative history, we affirm our prior findings that the categories of "telecommunications services" and "information service" in the 1996 Act are mutually exclusive.[86]

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v. Pena, 38 F.3d 591, 596 (D.C. Cir. 1994) ("We require litigants who urge departure from the plain meaning of the statutory language on the basis of congressional intent to shoulder a considerable burden.").

[85] See TIA Comments at 53-56; ITI Comments at 9 ("The NPRM tentatively concludes that information services are beyond the scope of Section 255, but seeks comment on whether the Commission should create an exception for widely-used information services such as voice mail and email. The Commission should not give this approach any further consideration, as it would be inconsistent with the statutory interpretations and conclusions that the Commission has already articulated in numerous other dockets.") (footnote omitted); Business Software Alliance ("BSA") Comments at 7 ("The Commission recognized again in its recent report to Congress on funding for universal service the continued vitality of the distinction between basic telecommunications service and other services, such as enhanced services, that are not regulated by the Communications Act.").

[86] See Federal-State Joint Board on Universal Service, Report to Congress, FCC 98-67 at ¶ 39 (rel. April 10, 1998) ["Universal Service Report"].

Indeed, as TIA correctly observes, the clear regulatory distinction between telecommunications services and information services is supported in the legislative history of the Telecommunications Act of 1996.[87]

Several commentors representing persons with disabilities urge the Commission to ignore its precedent and expand the definition of telecommunications services to encompass information services for purposes of Section 255.[88] According to National Association of the Deaf, the deregulatory justification used by the Commission to separate telecommunications and information services in the past is not applicable to Section 255 because Section 255 is intended to "create *new* regulatory obligations for service providers."[89] TIA disagrees.

In previous decisions, the Commission has recognized that subjecting information services to the burdens of Title II regulations (i.e., increased "regulatory obligations") would have a stifling effect on the "healthy and competitive development" of the information services industry.[90] Accordingly, the Commission has refrained from imposing Title II regulation on information services. Applying Section 255 to information services (regardless of whether the

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87 TIA Comments at 55 n. 83. See also Universal Service Report at ¶ 45 ("Accordingly, a decision by Congress to overturn Computer II, and subject those services to regulatory constraints by creating an expanded 'telecommunications service' category incorporating enhanced services, would have effected a major change in the regulatory treatment of those services. While we would have implemented such a major change if Congress had required it, our review leads us to conclude that the legislative history does not demonstrate an intent by Congress to do so.").

88 NAD Comments at 11-12; AFB Comments at 5; TDI Comments at 8-10; MATP Comments at 1.

89 NAD Comments at 12.

90 Universal Service Report at ¶ 46. See also TIA Comments at 54-55.

regulatory burden is "access") would specifically impose an obligation under Title II – a result that the Commission wishes to avoid.

If the Commission includes information services as "telecommunications services" for purposes of Section 255, it will be difficult for it to maintain a distinction between the two for other purposes, such as Universal Service.[91] In the end, the Commission may find itself becoming, as the Business Software Alliance has stated, the "Federal Computer Commission."[92] This is a role, however, the Commission has indicated it cannot and does not want to assume.[93] Information services should not be subject to the requirements of Section 255.

B. "Multi-Use" Equipment Should Be Subject To Section 255(C) Only If It Is Intended For Use With Telecommunications Services.

With regard to multi-use equipment, TIA generally agrees with the Commission that Section 255(c) should apply "only to the extent the equipment serves a telecommunications function." Equipment manufactured for non-telecommunications services or non-common carriers services does not need to be manufactured in accordance with Section 255(c). There are

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91 See Universal Service Order, 12 FCC Rcd. 9179-80 (1997) ("[W]e agree with the Joint Board that information service providers (ISP) and enhanced service providers are not required to contribute to support mechanisms to the extent they provide such services."). An interpretation that these same information service and enhanced service providers are subject to Section 255 would call into question this definition.

92 BSA Comments at 8.

93 See Universal Service Report at ¶ 47 ("Notwithstanding the possibility of forbearance, we are concerned that including information service providers with the 'telecommunications carrier' classification would effectively impose a presumption in favor of Title II regulation of such providers.").

models of equipment which are designed for use with either private systems or telecommunications services. Such equipment should be fully subject to Section 255(c).[94]

However, as TIA explains in its Comments in this proceeding, it is theoretically possible for virtually any equipment intended solely for use with a private network to be used with a telecommunications service.[95] If the Commission were to impose the requirements of Section 255 on all devices that could even "possibly" be connected to a telecommunications service, virtually all equipment that can transmit and receive data would be fully subject to compliance with Section 255 – whether it was manufactured for use with non-telecommunications service or not.[96] This constitutes a "possibility" application standard which would exceed both the reasonable purview of the legislation and the intention of the Commission.[97] TIA believes that the requirements of Section 255 should apply only to the extent the manufacturer intended the equipment to serve a telecommunications function.

In initial comments, TIA offered an example of the inappropriateness of applying an overly inclusive Section 255 compliance standard to multi-use communications equipment: A telephone specifically designed for use with a private network may be produced with customized features not normally expected to function with the PSTN. This non-telecommunications telephone would not (and should not) be subject to Section 255. Conversion for use with the PSTN would not be readily achievable by the manufacturer, technically or economically.

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94 To this extent, TIA agrees with ITI's Comments at 10.

95 TIA Comments at 59.

96 Id. at 60.

97 See TIA Comments at 57-58.

However, an errant hobbyist could conceivably fabricate an adapter that would permit the telephone to function, perhaps with only some of its intended features, with the PSTN. Under an overly broad definition of compliance, such a telephone would by definition be fully subject to the requirements of Section 255, *i.e.*, because it is "capable" of functioning with the PSTN.[98] This is surely not what Congress envisioned or what the Commission suggested in its NPRM.

As TIA observed, if the manufacturer of such a telephone (or any other device not intended for use with a telecommunications service) were required to produce the telephone in compliance with Section 255, competitors who could produce the same product more cheaply without having to comply with Section 255 would force the manufacturer out of that market. Conversely, the U.S. manufacturer attempting to confront foreign competition by not building its line of private network equipment in compliance with Section 255 would risk violation of U.S. law.

The most logical and practical approach to assuring compliance with Section 255 for multi-use telecommunications equipment is to look to the purpose underlying manufacture of the equipment. If it is apparent from the manufacturer's marketing materials or it is evident from the nature of the device itself that the equipment is reasonably expected to connect to a telecommunications service at any time, it should be fully subject to Section 255. For its part, Trace Research & Development Center, University of Wisconsin-Madison, favors applying Section 255 to equipment that "is manufactured for or marketed as equipment that would be used in a telecommunications system."[99] TIA agrees with Trace that the intention to manufacture for

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[98] NAD Comments at 17; AFB Comments at 5.

[99] Trace Comments at 5 (emphasis added).

or market equipment for use with telecommunication service is at the heart of the Section 255 inclusion criterion. TIA does not agree with those who would apply Section 255 to devices that theoretically "can" be used with telecommunications service but were not intended for that purpose. Such an approach is unnecessarily and unfairly inclusive and is not contemplated by Section 255.

C. Software Should Be Covered By Section 255 Only To The Extent That It Is "Integral" To The Functioning of the CPE Or Telecommunications Equipment.

Section 255(b) requires that manufacturers of telecommunications equipment and CPE ensure that it is designed, developed and fabricated to be accessible to and usable by individuals with disabilities, if readily achievable. In modern electronic products, manufacturers select a combination of hardware and software that will enable a product to perform its intended functions. Thus, as TIA pointed out in its Comments, manufacturers should be able to make telecommunications equipment and CPE accessible by whatever means is most practicable, whether through software, hardware, or an alternative approach.[100]

Most parties appear to agree with the Commission that Congress has not required software manufacturers to comply with Section 255 where software is not bundled with CPE.[101]

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[100] TIA Comments at 58 n.90.

[101] See, e.g., ITI Comments at 11, BSA Comments at 6, TIA Comments at 58 n.90. Cf. Trace Comments at 5, NAD Comments at 17. NAD asserts that the test for software, bundled or unbundled, is functionality, and that any other standard "may invite manufacturers to unbundle software for the purpose of avoiding their Section 255 obligations." NAD Comments at 17. The substantial expense and time that would be required to redesign equipment software makes it highly unlikely that any manufacturer would engage in such activity simply to avoid compliance with Section 255.

However, there is considerable disagreement with regard to whether the Commission is authorized to impose Section 255 requirements on software "bundled" with CPE. Some of this controversy may be generated by a lack of clarity regarding what the commentors mean when they refer to "bundled" software. Some commentors have described software as either "bundled" or "unbundled." Generally, the term "bundling" merely refers to a marketing or pricing arrangement where a "bundle" comprising two or more products, sometimes produced by independent firms, are offered for sale together for a single price.[102] Thus, the term "bundling" is not relevant to describing manufacturers' obligations under Section 255 for the accessibility of software. Rather, the obligations of manufacturers of telecommunications equipment and CPE hinge on whether the software in question is included within the ambit of the definitions of telecommunications equipment and CPE.[103] Only to the extent that software is so included, would it be subject to the manufacturer obligations of Section 255. In addition, a manufacturer is responsible for ensuring such software is accessible only to the extent that the software is developed by the manufacturer or by a firm developing such software to the specifications of the manufacturer under its direction and control.

As TIA pointed out in its Reply Comments in the Commission's proceeding implementing Section 273 of the 1996 Act, in the case of both telecommunications equipment

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[102] See Paul A. Argenti, Ed., The Portable MBA Desk Reference at 76 (1994).

[103] The term "telecommunications equipment " is defined by the 1996 Act as "equipment, other than customer premises equipment, used by a carrier to provide telecommunications services, and includes software integral to such equipment (including upgrades). The term "customer premises equipment is defined as "equipment employed on the premises of a person (other than a carrier) to originate, route, or terminate telecommunications." 47 U.S.C. § 153 (14), (45).

and CPE, the equipment utilizes a combination of hardware and software to perform these specific functions. Further, TIA described software (whether embedded in integrated circuits or recorded in other media) as a combination of algorithms which "makes the hardware of telecommunications equipment work" and CPE software as being "as much of the manufacturer's overall product design and development activities as physical design, electrical circuit layout, or radio frequency design."[104] In the case of CPE, TIA pointed out that software may be embedded in microprocessors that are physically part of the product or "specially designed for and unique to one or more CPE products, and provided separately or as an upgrade to the CPE." Further, TIA pointed out that the critical terms telecommunications equipment and CPE are defined "to a significant degree in terms of the functions they perform" – respectively, equipment used by a carrier to provide a telecommunications service and equipment on the premises of a person other than a carrier to "originate, route, or terminate telecommunications."[105] Thus, TIA believes that the only software subject to the requirements of Section 255 is that which, whether embedded in integrated circuits or recorded in other media, enables telecommunications equipment and CPE to perform the specific functions described in their statutory definitions, and, in the case of CPE, is specially designed for specific CPE products. Only such software can be considered "integral" to telecommunications equipment or CPE and thus subject to manufacturer obligations of Section 255.[106]

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[104] See FCC Docket CC - 96-254, TIA Reply Comments, February 24, 1997, at pages 8-11.

[105] Id. at 9-10.

[106] Because TIA's member companies are committed to providing accessible CPE, to the extent "readily achievable," manufacturers agreed in the TAAC Final Report that software that is "integral" to telecommunications equipment and CPE that is covered by Section 255 even

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To the extent that software performs functions that are not included in the statutory definitions of telecommunications equipment and CPE -- for example, equipment used to provide an information service – it would not be subject to Section 255. Similarly, if the software in question is not developed by, or for – but rather independent of – a manufacturer of telecommunications equipment or CPE (i.e. the creator of the combination of hardware and software), the manufacturer of the CPE would not be responsible for ensuring such independently developed software meets the accessibility obligations of Section 255, regardless of how such software might be marketed or priced.

Finally, TIA notes that this issue is extremely complicated and is the subject of a concurrent, ongoing proceeding in the common carrier bureau.[107] TIA urges the FCC to resolve this software issue in a manner that is consistent with the record and findings in that proceeding.

VII. IMPLEMENTATION PROCESS.

A. Overview.

The Commission's express goal for Section 255 implementation is adoption of a process designed to ensure that more accessible telecommunications equipment and CPE is introduced into the marketplace. The process is to be based on (1) resolution of complaints with a minimum of government interference; (2) responsiveness to those aggrieved by a lack of accessibility; and (3) efficient allocation of resources to avoid undue burdens being placed on the

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though the statutory definition of CPE omits mention of software. TAAC Final Report § 3.2 (definition of customer premises equipment).

[107] *Implementation of Section 273 of the Communications Act of 1934, As Amended by the Telecommunications Act of 1996*, CC Docket No. 96-254, FCC Docket No. 96-472, Notice of Proposed Rulemaking, 62 Fed. Reg. 3638 (January 24, 1997).

Commission, manufacturers and persons with disabilities.[108] A review of the comments filed in this proceeding clearly shows that the process proposed in the NPRM to resolve Section 255 complaints did not accomplish the intended result. With few exceptions,[109] virtually all parties expressed concern with the NPRM's proposed complaint resolution process.

Manufacturers, service providers, individuals with disabilities and advocacy groups representing individuals with disabilities all expressed significant concerns with the FCC's initial proposal. For example, BellSouth stated:

> In particular, the "fast track" proposal is rife with procedural rules that will themselves tend to become the compliance objective, thus not serving consumers' interests. The "fast track" proposal, while obviously well-intentioned, is misdirected.[110]

Individuals with disabilities and those representing their interests also argued that the complaint process in general was confusing and therefore counterproductive to the Commission's original goals. The President's Committee on Employment of People with Disabilities wrote that it "...is confused by the FCC's proposed complaint process, such as when an individual has the right to move from the 'fast track' to the 'informal' or 'formal' complaint process; or when a complaint would be moved to a alternative dispute resolution process. This needs clarification in the final rules, so that consumers may fully understand the means available to seek redress under Section 255."[111] Similarly, the State of Connecticut Office of Protection and Advocacy for Persons with

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[108] NPRM ¶ 124.

[109] See, e.g., David J. Nelson comments at 4 ("I support the FCC's proposal regarding the complaint process. I believe it is fair and reasonable").

[110] BellSouth Corporation ("BellSouth") Comments at 10.

[111] President's Committee on Employment of People with Disabilities ("President's Committee") Comments at 13. See also, virtually identical comments submitted by WID at 5; (Continued ...)

Disabilities wrote the "...implementation process is much too cumbersome and without any realistic timeliness for enforcement activities."[112] The Wisconsin Association for the Deaf - Telecommunications Advocacy Network Members stated more directly that "(t)he complaint process section is designed for lawyers, and we suspect even lawyers would find it confusing!"[113]

These comments fully support TIA's original view that "...the fast track process needs to be eliminated if the Commission is to be successful in meeting its multiple goals of resolving complaints with minimum interference; getting accessible products into the marketplace as quickly as possible; being responsive to persons with disabilities; and conserving the resources of all parties involved."[114] The comments call for a simpler approach to Section 255 complaints. In view of the comments submitted and the information provided below, TIA's Dispute Resolution Process should be adopted by the FCC.

B. Fast Track Process.

1. Response Period.

The fast track issue which received the most attention was that related to the time within which a respondent would be required to answer a fast track complaint. With the exception of one or two parties that filed comments supporting the FCC's fast track process

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Access Living of Metropolitan Chicago ("Access Living") Comments at 4; ACB at 4-5; Illinois Deaf and Hard of Hearing Commission ("Illinois Commission") Comments at 4.

[112] State of Connecticut Office of Protection and Advocacy for Persons with Disabilities ("Connecticut Office") Comments at 2.

[113] Wisconsin Association for the Deaf - Telecommunications Advocacy Network Members ("Wisconsin Association") Comments at 5.

[114] TIA Comments at 64-65.

without change,[115] almost every party submitting comments on this issue indicated that a 5 day response time was entirely too short to provide any meaningful chance of providing a substantive response to a fast track complaint. AT&T stated that "...the NPRM's proposed five business day deadline for respondents to initially report to the Commission on their handling of a 'fast-track' complaint is facially insufficient to allow such parties a meaningful opportunity to undertake an investigation of Section 255 complaints, which may frequently raise complex technical and service issues."[116] CTIA argued that the five day timeframe given the interests involved, is insufficient to respond to a fast track complaint.[117]

Comments submitted by the disability community were virtually identical to those submitted by industry. United Cerebral Palsy Association stated that:

> A complaint alleging inaccessibility or incompatibility of a key feature or function of a device, if true, may not typically be resolved within 5 days. UCPA believes that five days will not be long enough for the resolution, or even in many cases for the investigation, of many Sec. 255 complaints.[118]

Self Help for Hard of Hearing People, Inc. stated:

> Even assuming that the company has already set up internal processes for monitoring access, it may well not be possible for a company to assemble the documentation in five days.[119]

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[115] See, e.g., Nelson Comments.

[116] AT&T Comments at 12.

[117] CTIA Comments at 19.

[118] United Cerebral Palsy Association ("UCPA") Comments at 12.

[119] SHHH Comments at 29.

Joan Ireland wrote:

> Specifying that a consumer's complaint must be resolved within five days assumes that all complaints are simple ones. Such is not the case, and by limiting the resolution process to five days no consideration is given to a company's need to gather information not only on the complaint itself but also on the possible means available to resolve that complaint.[120]

The Trace Research and Development Center asserted that:

> It is believed that this [5 day response period] is too short a period. It is unlikely that companies can gather sufficient information to address a complaint in this period of time unless the company has been regularly receiving complaints about the issue. We appreciate the FCC's concern for rapid response, but feel that this would be difficult.[121]

National Association of the Deaf submitted comments which stated:

> ...given the likely complexity of many Section 255 complaints, the period proposed by the Commission may not provide manufacturers and service providers adequate time to evaluate and address accessibility problems. The result is likely to be endless requests for extension of time, which would defeat the purposes of Section 255.[122]

The industry and consumer comments on these particular issues are totally consistent with the view originally expressed by TIA that a 5 day response period was not a realistic timeframe for responding to fast-track complaints if the Commission's goal to resolve most issues without resort to more formal litigation processes were to be accomplished. The

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[120] Joan Ireland Comments at 2.

[121] Trace Comments at 8.

[122] NAD Comments at 35.

only significant substantive difference in the comments of those who agreed that a 5 day response time is unrealistic and TIA's proposed Dispute Resolution Process, is the time within which a manufacturer should be required to respond to the query of a person claiming to be aggrieved by a lack of accessibility.

Most parties submitting comments on this issue took the position that a response time of between 10 business days after receipt of a complaint with an outside limit of 30 calendar days, should be sufficient. TIA asserts that even 30 days is not a reasonable amount of time for a manufacturer to respond to a Section 255 complaint. Other than one party who argued the general conclusion that "...if manufacturers and service providers keep accurate records regarding their efforts for ensuring products and service accessibility, they should not need a great deal of time to respond to consumer complaints."[123] no party documented the types of activities which manufacturers may have to undertake to respond adequately to a fast track complaint. TIA, on the other hand, provided concrete examples of the types of factors that would have to be taken into consideration for manufacturers to be able to adequately respond to Section 255 complaints.

While a number of service providers that argued for a 30 day response period, TIA notes that manufacturers need 60 days to respond to Section 255 complaints, because the process of designing, developing and fabricating a given product and conducting the analysis of whether it is "readily achievable" to make the product accessible involves numerous people and many individual factors, all of which are inextricably intertwined. As described in the comments of Motorola, this is a time–consuming and complicated process.[124] Thus, for manufacturers, it is

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[123] Id.

[124] See Motorola Comments at 24-32.

unrealistic to assume that 10 business days or 30 calendar days is a sufficient time period in which to respond to a complaint filed under Section 255.

As TIA pointed out in its initial comments, there are many factors that go into a response to a Section 255 complaint. One factor which will have a significant influence on the speed with which a manufacturer can respond to a complaint is the level of specificity in the complaint and the ability of the complainant to articulate the accessibility problem.[125] In its original comments TIA indicated that a manufacturer's likely first response to a complaint would be to make sure it fully understood the nature of the complaint and the disability involved. TIA questioned the type of specificity manufacturers might receive in complaints forwarded by the Commission and whether the Commission would have sufficient resources to fully understand and be able to communicate the nuances of a Section 255 complaint to manufacturers.[126] An example of the type situation TIA was concerned about can be demonstrated through the comments of Malisa W. Janes, Rh. D. Ms. Janes writes:

> I gave a presentation on available technology for people with hearing loss and 95 old folks showed up. I was shock[ed] to find they did not know anything about assessing the quality and function of their hearing aids, the availability of telecommunications compatible hearing equipment, or the services that they should be able to access. They do not know what to ask for and get rude treatment because the sales folks do not know

[125] The need for specificity is one reason why TIA proposed that a standard complaint form be used to file a complaint under Section 255.

[126] The National Association of the Deaf and Self Help for Hard of Hearing People also believe this is a concern. In its comments, National Association for the Deaf stated that the FCC must have knowledgeable staff familiar with Section 255 and accessibility issues in general, NAD Comments at 34. Self Help for Hard of Hearing People wrote that for the FCC to be responsive to consumers' inquiries, it should have a call center staff capable of handling not only Section 255 complaints, but also with expertise in disability access issues and other disability laws. The FCC needs to have staff trained in communicating with consumers with various disabilities and be trained in the use of TTY, relay and Braille. SHHH Comments at 30.

> what they need. When they do get equipment that can help them, they don't know how to use it![127]

TIA does not condone rude treatment of any customers. It also believes that Section 255 and the actions the Commission takes as a result of this proceeding, can serve to reduce, and someday eliminate, the lack of understanding referred to in Ms. Janes' comments. Nonetheless, the foregoing passage demonstrates why a 5 day, 10 business day or even a 30 calendar day response period to an initial complaint is unrealistic and why TIA's proposed Dispute Resolution Process is a more appropriate means of handling complaints than is the fast track process.

TIA can envision a scenario in which a person with a hearing disability who does not know what (s)he needs and who may not know about the equipment (s)he has (or whether the equipment is the appropriate equipment for the disability in question) files a complaint with the FCC. Since the Commission's goal of forwarding complaints within one business day will likely result in the transmission of the complaint without substantive review, it is also likely that the complainant's lack of understanding of the details of his or her hearing aid equipment and its capabilities would necessitate the respondent having to contact the complainant[128] to ascertain more facts to begin to understand the nature of the problem. Depending on the nature of the complaint, the understanding of the parties involved, and the availability of the complainant, it might take a few weeks for a manufacturer to make contact with the complainant, discuss the

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[127] Malisa W. Janes Comments at 2.

[128] TIA's Dispute Resolution Process requires manufacturers to make an initial contact with the aggrieved party within 5 business days after the point of contact has been contacted by the aggrieved party and to provide a complete, detailed response to the aggrieved party with a copy to the FCC as promptly as possible but in no event later than 60 days after receipt of the aggrieve party's initial contact with the manufacturer.

nature of the problem and simply start to understand the problem, let alone to respond to it substantively.

2. Extensions of Time.

With regard to filing requests for extension of time to respond to fast track complaints, there were two general themes in the comments. The first relates to the ability of respondents to answer fast track complaints and the second relates to the issue of penalties being imposed on parties who file "frivolous" requests for extension of time.

With regard to requests for extension of time in general, a number of parties filing comments suggested that the fast track response time should generally be short but extensions of time should be allowed for good cause. TIA noted in its original comments that filing requests for extension of time to respond to fast track complaints would be counterproductive to the Commission's goals since that would merely delay consideration of legitimate complaints and would divert manufacturers' resources from providing accessible products to engaging in the litigation process. TIA expressed the view in its original comments and restates that view here, that the more reasonable approach to fast track and the complaint process in general would be to adopt rules which allow complainants and respondents a sufficient amount of time to discuss the issues and attempt to come to a resolution of the alleged problem without having to request an extension of time. Nothing in the comments submitted in this docket has demonstrated that requests for extension of time serve any useful purpose.

Furthermore, TIA opposes the notion that a party seeking an extension of time be penalized for frivolous requests. [129] Neither of the two parties filing comments making this proposal has demonstrated that there is any reason to believe that frivolous requests will be filed. Neither of the parties suggests factors that would be used by the Commission to determine whether a request for extension of time were frivolous. Absent evidence of abuse, adoption of such a rule would be counterproductive to the process of resolving complaints amicably and quickly since it would: (1) serve to make the parties even more defensive; and (2) divert resources from making products accessible to the process of justifying a request for extension of time. Nonetheless, to the extent that the Commission sees fit to adopt a rule which would impose penalties on parties who submit "frivolous" requests for extension of time, TIA submits that the Commission should adopt a corresponding rule which would impose penalties on parties who file frivolous complaints under Section 255. If the Commission believes that the threat of penal sanctions will reduce the possibility of abusing Section 255 implementation procedures, the sanctions should be applied equally to complainants and respondents.

3. Mandatory Pre-Filing Contact.

In its original comments, TIA argued that the most efficient method of resolving potential complaints and providing more accessibility in a shorter period of time is to require parties with potential complaints first to raise the issue with the manufacturer. Most parties filing comments in this proceeding agreed that informal contact between a potential complainant

[129] See Universal Service Alliance ("USA") Comments at 13; June Isaacson Kailes ("Isaacson Kailes") Comments at 5 asking the FCC to impose penalties for "frivolous" requests for extension of time.

and respondent would be helpful, but not all parties supported mandatory initial contact. Indeed, even though its comments do not support mandatory pre-filing contact, the comments of the National Association of the Deaf illustrate the value of mandatory initial contact wherein it stated:

> By directly contacting the manufacturer or service provider, the consumer may be able to resolve the problem quickly and easily, without involving the Commission. However, to be able to do this, consumers must know whom to contact and how. Manufacturers and service providers should be required to designate representatives to handle Section 255 complaints. Without this list, consumers will be without information vital to the informal resolution of many complaints that need not reach the FCC.[130]

TIA and virtually every party filing comments in this proceeding on this issue agreed that manufacturers and service providers should provide the Commission with a point or points of contact of the persons or offices within their respective organizations that will be responsible for handling Section 255 complaints. Informal resolution of potential complaints without resort to the FCC serves the public interest. Therefore, TIA suggests that the FCC adopt rules which require potential complainants to contact the manufacturer before a more formal complaint can be filed. In this regard, TIA asserts that the procedures established in its Dispute Resolution Process proposal, which includes a mandatory pre-filing contact requirement, should be adopted.

One party, the Universal Service Alliance, proposed that manufacturers be required to establish a "single point of contact."[131] In its initial comments, TIA explained that

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[130] NAD Comments at 33.

[131] USA Comments at 13.

different organizations may have different methods and structures for handling Section 255 inquiries. Some manufacturers may find it serves their organizational structure better by having multiple points of contact for different products or families of products, while others may find it more efficient to establish only a single point of contact. TIA submits that as long as potentially aggrieved parties can establish contact quickly with an appropriate responsible person within a manufacturer's organization, the Commission should not adopt a rule which requires only a single point of contact.

C. Penalties.

1. Applicability of Section 207-208 and 312.

TIA's initial comments in this proceeding expressed the view that neither Sections 207-208 (which are applicable only to common carriers) nor Section 312 (which is applicable only to Title III radio licensees) should be deemed applicable to manufacturers of telecommunications equipment or CPE, and that the Commission could not expand the express language of those particular sections of the Communications Act of 1934, as amended, to include manufacturers.[132] Both the National Association of the Deaf and Self Help for Hard of Hearing People took a contrary position. The National Association of the Deaf argued that there is no reason to draw a distinction between manufacturers and service providers for purposes of Section 255 with regard to remedies available for noncompliance. Self Help for Hard of Hearing People argued, in addition, that Section 312(b) applies to "anyone" who has violated or failed to observe any provision of the Communications Act. Both parties take the position that damages available

[132] TIA Comments at 97-98.

pursuant to Sections 207 and 208 are available to be used against manufacturers. Both parties cite to language in the Conference Report of the Telecommunications Act of 1996 which states that "...the remedies available under the Communications Act, including the provisions of Sections 207 and 208, are available to enforce compliance with the provisions of Section 255."[133] Self Help for Hard of Hearing People also cites the following remarks of Senator Leahy to support its argument:

> I think Congress has been behind the curve in telecommunications. We need to update our laws to take account of the blurring of the formerly distinct separation of cable, telephone, computer and broadcast services.[134]

The arguments made by both the National Association of the Deaf and Self Help for Hard of Hearing People are incorrect as a matter of law and statutory construction.

First, as noted above, Sections 207 and 208 are expressly applicable only to common carriers and Section 312 is expressly applicable only to Title III radio licensees. Except in very rare circumstances, manufacturers of telecommunications equipment and CPE are neither common carriers nor Title III licensees.

Second, Section 255 of the Communications Act is applicable to both manufacturers and service providers. The language cited in the Conference Report about Section 207 and 208 remedies being available for enforcement of Section 255, is clearly a reference to remedies that may be available for violations of Section 255 committed by those service

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[133] NAD Comments at 39-40; SHHH Comments at 22-25 (citing Conference Report 104-230, 204th Cong., 2nd Sess. 21-22, 135 (1996)).

[134] SHHH Comments at 25.